IN THE

Supreme Court of the United States

October Term, 1973

No. 73-582

CITY OF PITTSBURGH,

Petitioner,

vs.

ALCO PARKING CORPORATION; ARENA PARKING, INC.; CAMPUS PARKING, INC.; FOURTH AVENUE PARKING, INC.; GRANT PARKING, INC.; HARRY W. SHEPPARD, JR., t/a Stanwix Auto Park; JOHN COMINOS, t/a Liberty Parking; JOHN STABILE and ROCCO A. DEL SARDO, t/a Wm. Penn Parking Lot; K-SEVEN PARKING COMPANY; MEYERS BROS. PARKING-CENTRAL CORP.; PARKING SERVICE CORPORATION, INC.; WM. PENN PARKING GARAGE, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

BRIEF FOR RESPONDENTS IN OPPOSITION

LEONARD BOREMAN,
RICHARD H. MARTIN,
BASKIN, BOREMAN, WILNER, SACHS, GONDELMAN & CRAIG,
Attorneys for Respondents,
1018 Frick Building,
Pittsburgh, Pa. 15219,
(412) 562-8645.

LEONARD M. MARKS,
GOLD, FARRELL & MARKS,
Special Counsel for Respondent, Meyers Bros. Parking-Central Corporation,
595 Madison Avenue,
New York, New York 10022.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

INDEX TO BRIEF.

TABLE OF CITATIONS.

CASES.

STATUTES.

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-582

CITY OF PITTSBURGH,

Petitioner,

vs.

ALCO PARKING CORPORATION; ARENA PARKING, INC.; CAMPUS PARKING, INC.; FOURTH AVENUE PARKING, INC.; GRANT PARKING, INC.; HARRY W. SHEPPARD, JR., t/a Stanwix Auto Park; JOHN COMINOS, t/a Liberty Parking; JOHN STABILE and ROCCO A. DEL SARDO, t/a Wm. Penn Parking Lot; K-SEVEN PARKING COMPANY; MEYERS BROS. PARKING-CENTRAL CORP.; PARKING SERVICE CORPORATION, INC.; WM. PENN PARKING GARAGE, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

BRIEF FOR RESPONDENTS IN OPPOSITION

Counter-Questions Involved

1. Should this Court review a determination by the Supreme Court of Pennsylvania holding invalid a municipal tax ordinance because the City imposed an arbitrary, excessive and unreasonable tax of 20% of the gross receipts of private parking operators while itself engaging in direct privileged competition through its Parking Authority, all contrary to the intention of the State Legislature expressed in the Pennsylvania Parking Authority Law of 1947?

2. Should this Court review a determination of the Supreme Court of Pennsylvania holding a municipal 20% gross receipts tax on private parking operators to be so arbitrary, excessive and unreasonable in conjunction with direct favored competition from the City Parking Authority and contrary to expressly enacted state legislative intent, that in this "rare and special instance" and "the special competitive circumstances of this case" the tax was confiscatory and deprived private operators of their property without due process of law?

3. Should this Court review the determination of the Supreme Court of Pennsylvania that an overwhelming factual demonstration had been made that the City, through the imposition of an excessive and unreasonable 20% gross receipts tax and the direct competition of its public parking authority, contrary to expressly enacted state legislative intent, had appropriated virtually all the economic benefits and earnings of the private operators?

Counter-Statement of the Case

Initially, this litigation involved a suit in equity by respondents to enjoin the collection of a parking tax imposed pursuant to Ordinance No. 704 of the City of Pittsburgh, enacted December 31, 1969, which became effective on February 1, 1970, and for a refund of taxes paid thereunder. During the pendency of this lawsuit, however, the City of Pittsburgh enacted a new parking tax ordinance, Ordinance No. 30 of 1973, effective April 1, 1973, which superseded Ordinance No. 704, the parking tax ordinance challenged herein. Unlike the challenged ordinance that imposed upon the parking operators a 20% tax on the gross receipts of each non-residential parking operation, the new ordinance imposed a tax of 20% upon the consideration paid by the

patrons of a non-residential parking place for each parking transaction, to be collected from the patron by the operator of each such non-residential parking place (A. 23a).[1] Therefore, the request for injunctive relief has been rendered moot, while the only question remaining is the right of respondents to obtain a refund for taxes paid under former Ordinance No. 704 of the City of Pittsburgh.[2]

The Supreme Court of Pennsylvania held the superseded 1970 tax ordinance invalid upon respondents' factual showing that the excessive and unreasonable 20% tax imposed on their gross receipts, when taken in conjunction with direct competition by the taxing body in the same business, rendered it impossible for a substantial majority of the private parking industry to operate at any profit whatsoever. The Supreme Court of Pennsylvania held that such result was contrary to the intent and purpose of the Legislature of Pennsylvania when it passed the Parking Authority Law, 1947, June 5, P. L. 459, § 1, as amended, 53 P. S. § 341, *et seq.*

As stated by petitioner (P. 5), respondents own all but 4% of the private parking spaces in the downtown area of the City of Pittsburgh, amounting to approximately 71% of the total downtown parking spaces, while the Parking Authority of the City of Pittsburgh controls the balance of

---

[1] References designated by "A" are to pages of the Appendix filed by Petitioner.

References designated by "P" are to pages of the Petition of the City of Pittsburgh For a Writ of Certiorari to the Supreme Court of Pennsylvania.

References designated by "R" are to pages of the record filed in the Supreme Court of Pennsylvania.

[2] The Supreme Court of Pennsylvania remanded the case to the Court of Common Pleas to determine the "nature and extent" of the refund to which respondents may be entitled. (A. 27a)

such spaces. The creation of the Parking Authority was initially authorized by the Pennsylvania Legislature by enactment of the Parking Authority Law, *supra*, with the express intention, as stated in the law itself, that:

> "The authority cooperate with all existing parking or parking terminal facilities, or both, so that private enterprise and government may mutually provide adequate parking services for the convenience of the public." 53 P. S. § 342(i) (A. 21a, 22a)

In 1962, the City of Pittsburgh enacted, for the first time, a tax on non-residential parking facilities at a rate of 10%. This tax, which was a predecessor of the tax now subject to this litigation, was challenged, *inter alia*, on the ground that it was confiscatory, but said challenge was unsuccessful. *McGillick v. City of Pittsburgh*, No. 85 January Term, 1963, *aff'd per curiam*, 415 Pa. 581, 203 A. 2d 481 (1964). The Court in *McGillick*, relying on *Philadelphia v. Eglin's Garages, Inc.*, 342 Pa. 142, 19 A. 2d 845 (1941) and *Philadelphia v. Samuels*, 338 Pa. 321, 12 A. 2d 79 (1940), held that the record therein was insufficient "to indicate that the tax rate of 10% of the gross receipts is excessive or confiscatory".

In 1968, the City of Pittsburgh enacted a new parking tax ordinance, which superseded the 1962 ordinance and raised the rate of taxation to 15% of the gross receipts of non-residential parking operators.

In challenging the 1970 parking tax ordinance, which again increased the tax rate to 20% of gross receipts, respondents presented uncontroverted evidence of their inability to make a profit from the vast majority of their operations as a result of the high rate of the tax, their inability to pass the tax on to their patrons, and the favored

competition of government-operated parking facilities.[3] The record, which contains an unprecedented revelation by respondent parking operators of their financial records,[4] clearly demonstrates that the City of Pittsburgh parking tax requires respondents to pay 34⅓ times the taxes of other businessmen within the City (R. 179a), that private parking operators as a class are suffering devastating losses and have no opportunity to make a profit at substantially all of their facilities (Pl. Ex. 1, R. 507a-616a; A. 71a), and that competition at lower rates from the Pittsburgh Parking Authority, which is an arm of city government, effectively prohibits respondents from price increases designed to offset the effects of the unreasonably high parking tax (A. 14a, 16a, 17a, 18a). The City produced no evidence at trial which contradicted these facts.

Both the Commonwealth Court and the Supreme Court of Pennsylvania found these facts established by the record and further found that many of the Chancellor's findings were erroneous and unsupported by the record. Each of the appellate courts agreed that the 20% gross receipts tax

---

[3] The court below found on the basis of the evidence produced by respondents that:

> ". . . as the gross receipts tax increases from the original ten percent to the present 20 percent the percentage and number of parking lots unable to achieve any profit doubles. Again based on projections for 1970, when compelled to pay the 20 percent gross receipts tax, 65 percent of the individual lots would sustain operating losses. If the tax had remained at 15 percent, only 37 percent of the lots would fail to earn a profit. If the tax was reduced to its original ten percent then only 30 percent of the lots would sustain losses." (A. 15a)

[4] Respondents produced extensive, detailed financial statements of their individual parking operations. See Plaintiffs' Exhibit 1 (R. 507a-616a) See also the uncontested summary of 1970 operations set forth in the opinion of the Commonwealth Court. (A. 71a)

was excessive and unreasonable on the factual showing made in this case and that the operators were unable to pass on the tax (A. 14a-18a, 23a-24a, 61a-63a, 70a-72a).

The Pennsylvania Commonwealth Court found that:

> "1. There are about 24,300 parking spaces in the City of Pittsburgh. Of this number 6100 are served by a public parking authority, subjected to this tax, but exempt from other taxes including those on real estate.[5] Of the balance of about 18,000 spaces, the plaintiffs here owned or operated about 17,000.
>
> 2. Based upon six months' operations and a sound statistical projection for the balance of the year 1970 with expenses computed at 1969 rates, that portion of the industry represented by appellants, would, during the year 1970, earn gross revenues of over $8,000,000, pay $1,600,000 on account of this tax and sustain a loss of $270,000. Of the fourteen appellant enterprises nine would sustain losses and of the others the one showing the largest profit would earn an amount equal to only 2.9% of its gross revenues.
>
> 3. The appellants are unable to pass the tax on to their customers, not only because customers cannot and will not pay higher taxes but also because the appellants are in competition with a public authority which, exempt from other taxes, can charge less.
>
> 4. The rate of tax was increased from fifteen per centum effective in 1969 to twenty per centum, although in 1969 the appellants lost $26,000 on gross revenues of about $7,700,000 on which they paid a tax under this ordinance of more than $1,400,000." (A. 62a, 63a).

---

[5] Although the Pittsburgh Parking Tax Ordinance of 1970 expressly includes the Parking Authority as subject to the tax, the Court of Common Pleas of Allegheny County in *Public Parking Authority, et al. v. City of Pittsburgh*, No. 687 July Term, 1972, has ruled that the Parking Authority is exempt from this tax since its parking garages being "public property used for public purposes" are exempt from *all* taxes. This case is now pending on appeal before the Commonwealth Court of Pennsylvania, No. 97 C. D. 1973.

The Pennsylvania Supreme Court found that:

"After the imposition of the 20 percent gross receipts tax appellants' projected figures for 1970 show that out of 14 different parking lot operators in downtown Pittsburgh nine would sustain operating losses. Of the five operators earning a profit only two would achieve a return of one percent or better. The highest return projected for any of the 14 operators in 1970 was 2.9 percent (A. 14a-15a).

• • •

"The Commonwealth Court unanimously agreed that the tax was imposed at an unreasonable rate . . . [and] . . . also unanimously agreed, contrary to the chancellor's findings, that 'appellants' [sic] are unable to pass the tax on to their customers, not only because customers cannot and will not pay higher rates but also *because the appellants are in competition with a public authority which, exempt from other taxes, can charge less.* (Emphasis added)" (A. 16a)

• • •

"Appellants, on this record, have shown that more than 'an occasional operator cannot afford to continue in business'. However, the chancellor found that appellants have made no significant attempt to pass the tax on to the consumer. As noted previously the Commonwealth Court was of the unanimous opinion that the tax could not be passed on to the consumer because of the competition from the Public Parking Authority. Clearly if the private parking lot operators attempted to pass the full burden of the tax on to the consumers they would only succeed in increasing the disparity in the already disparate rates. For example, at the all-day rates shown in the record, if appellants were to attempt to pass the tax on to their patrons, their rates would increase from an average of $3.00 to $3.60, while a similar tax pass-on by the Public Parking Authority would increase their average rate from $2.00 to $2.40. Thus the differential in rates would increase from $1.00 to $1.20. (A. 17a-18a)

• • •

"As appellants emphasize it is doubtful that the state Legislature ever intended the public parking authorities utilizing public financing advantages, to compete directly with private parking operators in this fashion. In fact, the declaration of policy in the Parking Authority Law of 1947* specifically provides: '. . . That it is intended that the authority cooperate with all existing parking facilities so that private enterprise and government may mutually provide adequate parking services for the convenience of the public;' Act of June 5, 1947, P. L. 458, § 2, as amended, 53 P. S. § 342. Nonetheless, Pittsburgh parking operators are now not only denied the cooperation intended in the statute, but are actually confronted with direct, adverse competition from the Public Parking Authority." (A. 21a-22a)

ARGUMENT

I

This Court should not review the decision of the Supreme Court of Pennsylvania holding the Pittsburgh Parking Tax Ordinance of 1970 invalid in the context of the policy of the Pennsylvania Legislature as set forth in the Parking Authority Law of 1947.

The petition is an attempt to have this Court review the decision of the highest court of Pennsylvania holding invalid an unreasonable and confiscatory city tax of 20% of the gross receipts of parking operators when combined with privileged public competition from the State-created Pittsburgh Parking Authority.[6]

---

* Parking Authority Law, Act of June 5, 1947, P. L. 459, §§ 1 *et seq.*, as amended, 53 P. S. §§ 341 *et seq.*

[6] Justice Roberts, speaking for the majority, stated:

"By taking 20 percent of gross revenues 'off the top' the City effectively confiscates what were formerly the earnings of the parking lot owners. This confiscation is practically as complete as if the City had condemned without compensation the private lots to erect public facilities." (A. 23a)

The Supreme Court of Pennsylvania found that the City of Pittsburgh by combining the crippling 20% tax with deliberate competition of its Parking Authority, which enjoyed lower rates, real estate tax exemptions and public financing, had completely altered and undermined the intention of the Legislature of the Commonwealth of Pennsylvania in creating the Parking Authority Law of 1947.

Justice Roberts, writing for the Court, concluded that the State Legislature had never contemplated nor intended public parking facilities to compete on a favored basis with private parking operators to the detriment of the private segment of the industry. Rather, the State Legislature specifically provided that the Parking Authority was to cooperate with private enterprise, for the benefit of the municipality, rather than force the private operators out of business as Pittsburgh was doing.

The Supreme Court of Pennsylvania found:

> "This Court has heretofore not had occasion to hold a tax to be so excessive and unreasonable as to compel the conclusion that it was not the proper exertion of taxation, but a confiscation of property. However, this Court has not previously had presented to it a controversy where the taxing body was in direct competition, as here, with private enterprise and simultaneously imposed a burdensome gross receipts tax on all competitors in that activity (including itself). This is undeniably a 'rare and special circumstance' where the due process clause imposes strict constraints upon the exercise of the legislative taxing power.
>
> "As appellants emphasize it is doubtful that the State Legislature ever intended the public parking authorities utilizing public financing advantages, to compete directly with private parking operators in this fashion. In fact, the declaration of policy in the Parking Authority Law of 1947 specifically provides: '. . . That it is intended that the authority cooperate with

all existing parking facilities so that private enterprise and government may mutually provide adequate parking services for the convenience of the public;' Act of June 5, 1947, P. L. 458, § 2, as amended, 53 P. S. § 342. Nonetheless, Pittsburgh parking operators are now not only denied the cooperation intended in the statute, but are actually confronted with direct, adverse competition from the Public Parking Authority." [7] (A. 20a-22a.)

The Pennsylvania Supreme Court had earlier sustained the constitutionality of the Parking Authority Law on the basis of these findings and held that the State Legislature specifically intended a marriage of public aid and private initiative in solving the parking crisis. In *McSorley v. Fitzgerald*, 359 Pa. 264, 59 A. 2d 142, 145 (1948), it held:

"Not only is the declaration of legislative findings in the present Act impressive in pointing out the urgent need of legislation of this type, but the conditions it

---

[7] The Legislature of Pennsylvania enacted the Parking Authority Law after having determined that a parking crisis existed in cities of the Second Class, of which Pittsburgh is one, which required a joint cooperative effort between private and governmental enterprise. Section 2 of said Act reads in part:

"(g) That this *parking crisis*, which threatens the welfare of the community *can be reduced* by providing sufficient off-street parking or parking terminal facilities, or both . . .;

(i) That it is *intended that the authority cooperate with all existing parking or parking terminal facilities, or both so that private enterprise and government may mutually provide adequate parking services for the convenience of the public.*" (Emphasis added) Parking Authority Law, 1947, June 5, P. L. 458, § 2, as amended, 53 P. S. § 342.

The same conclusion concerning State Legislative intent had been reached by Judge Kramer writing for the minority of the Commonwealth Court:

"Authorities (referring to the Public Parking Authority) were not instituted for the purpose of making profits and, therefore, should show none." (A. 74a) Contrary to the expressed intention of the State Legislature, however, the Pittsburgh Parking Authority "consistently has earned handsome annual profits." (A. 72a, Footnote 1).

portrays are well known to all inhabitants of our larger cities. It is unfortunate that many operators of automobiles habitually ignore the fact highways are intended primarily for travel and not for the storage of vehicles other than by way of transistory stops for loading and unloading. The congestion caused by such misuse of the streets and by the ever-increasing amount of motor vehicles traffic has become a major problem of municipal administration,—a problem particularly acute in a city like Pittsburgh where it is aggravated by the concentration of the downtown business section in a 'Golden Triangle' of comparatively narrow streets and tall office and commercial buildings, many of the occupants of which use private automobiles to and from their offices and stores. Studies made by the Pittsburgh Regional Planning Association and the Allegheny Conference on Community Development reveal that parking facilities in the city are grossly inadequate and that private enterprise has not been able to solve the problem because private parking lots are frequently temporary in nature and located without much regard for actual parking requirements, vacant land being utilized for parking purposes in more or less haphazard fashion merely for the purpose of earning taxes on the land pending profitable disposition of it for construction purposes. Under such circumstances, as was said in *Belovsky v. Redevelopment Authority of Philadelphia*, 357 Pa. 329, 339, 54 A. 2d 277, 283, 172 A. L. R. 953, 'public aid must accompany private initiative if the desired results are to be obtained.'" 59 A. 2d 142 at 145.

In sum, in the case now before this Court, the decision of the Supreme Court of Pennsylvania was based largely on an interpretation of the Legislative intent in passing the Pennsylvania Parking Authority Law and the conflict between the State's intent and the tax passed by the City of Pittsburgh. The intimate relationship of these matters of interpretation of state law with the constitutional issue raised, makes this case particularly inappropriate for review by this Court.

II

The Supreme Court of Pennsylvania was correct in its holding that in this "rare and special instance" and the "special competitive circumstances of this case" the City's 20% gross receipts tax was an arbitrary and invalid exercise of the City's taxing power.

Contrary to the assertions of petitioner, the issue raised in this litigation does not involve a determination of whether the due process clause limits the power of a legislative body to raise revenue by means of taxation. Nor did the court below suggest that government may not enter fields previously occupied by private enterprise and even afford public facilities competitive advantages. At stake here is a narrow issue which was explicitly decided by the Supreme Court of Pennsylvania on the unique facts of this record—whether the City of Pittsburgh acted arbitrarily, and contrary to state legislative policy, in imposing an unreasonable and excessive 20% gross receipts tax on the private sector of the parking industry under circumstances which prohibited the private operators from passing the tax on to their patrons in the form of increased prices because of the favorable competitive position of the City's own Parking Authority.

As stated above, of prime importance is the recognition by the Pennsylvania Supreme Court that the Pennsylvania Legislature did not intend that the Public Parking Authority gain a superior competitive position or cause the demise of the private parking business in favor of public control.[8]

[8] While petitioner suggests that there is a distinction between the City of Pittsburgh, the taxing body herein, and the Pittsburgh Public Parking Authority and, therefore, the competition actually arises from a different governmental source, it is quite clear that this argument is spurious and attempts to elevate form over substance. Regardless

(Footnote continued on following page)

While recognizing the importance of public and private cooperation within the parking industry, as did the Legislature of Pennsylvania, the Supreme Court of Pennsylvania emphasized the extraordinary advantage that the Pittsburgh Parking Authority is able to exert over the private parking operators such as the former's ability to charge lower rates due to its exemption from real estate taxes and the long term, low interest public financing not available to private businessmen. Justice Roberts found that such advantages:

> ". . . reduce significantly the rates charged by the Authority, and increases the intensity and degree the nature of its direct competition with private parking lot operators. It is certainly undeniable that the Parking Authority is able to finance its site and construction costs through the attractive medium of long term, lower interest public financing, with all the benefits which attend such governmental arrangements, not

---

(Footnote continued from preceding page)
of the labels used to describe the Public Parking Authority, it is clear that it is, in fact, an arm of the City of Pittsburgh. First, its Chairman and all of its board members, who establish rates for and control operations at all Authority facilities, are appointed by the Mayor of the City of Pittsburgh and are directly responsible to his office; second, it is a matter of public record that, from 1966 through 1970, inclusive, the City of Pittsburgh has derived revenues from the operation of the Public Parking Authority in the amount of $1,626,154.00, (see Annual Report of the City Controller for Fiscal Year Ended December 31, 1966, at p. 30; 1967 at p. 30; 1968 at p. 36; 1969 at p. 36; 1970 at p. 37. These documents are kept as public records in the offices of the City of Pittsburgh), and third, the debt of the Public Parking Authority is now computed as a debt of the City of Pittsburgh for purposes of the total debt limitations of the City under the provisions of the Local Government Unit Debt Act, 1972, July 12, P. L. ____, No. 185, § 101; 53 P. S. § 11-202, 209.410. In fact, the only relevant factor pertaining to the Public Parking Authority which is not controlled by, or responsible to, the City of Pittsburgh was the act of the Legislature of the Commonwealth providing the mechanism by which said Authority could come into existence, and this was only at the option of the local governmental body. See Parking Authority Law, Act of June 5, 1947, P. L. 458, § 2 as amended, 53 P. S. § 342.

available to private businessmen. See Price v. Philadelphia Parking Authority, 422 Pa. 317, 335, 221 A. 2d 138, 148 (1966). It is the combination of these factors which creates the extraordinary advantage which the Public Parking Authority is able to exert over the non-governmental parking lot owners and operators." (A. 22a, 23a)

The Court's references to the public competitive advantage, however, do not imply that public competition is barred, but emphasize the fact, established by the record, that in the unique circumstances in this case, the City's imposition of a prohibitive 20% gross receipts tax, while at the same time extending the competitive advantage of the public facilities, all contrary to state legislative policy, was arbitrary and rendered the ordinance invalid. Moreover, the Court found that this unique combination of facts destroyed the profitability of the private sector of the industry and, therefore, amounted to a governmental taking of private property.

In reaching this result, the Supreme Court of Pennsylvania is consistent with its prior rulings in *Philadelphia v. Samuels*, 338 Pa. 321, 12 A. 2d 79 (1940) and other cases,[9] that a municipal parking tax would be held invalid where a proper and substantial record demonstrated that more than an occasional operator could not make a profit and that the tax could not be passed on to the parking customers (A. 23a).

The factors accounting for the decision in favor of the respondents in this case, in contrast to the results in the *Samuels*, *Eglin's Garages* and *McGillick* cases, were the

[9] The result herein was also forewarned in *Philadelphia v. Eglin's Garages, Inc.*, 342 Pa. 142, 19 A. 2d 845 (1941), and *McGillick v. City of Pittsburgh*, No. 85 January Term, 1963 (Court of Common Pleas of Allegheny County), aff'd. *per curiam*, 415 Pa. 581, 203 A. 2d 481 (1964).

imposition of the prohibitive 20% rate, rather than the 10% rate in the prior cases, and the ability of respondents to demonstrate on the record a financial condition so deteriorated as to meet the two-pronged *Samuels* test.[10]

In addition, this case presented the palpable violation of state legislative policy whereby the city-owned facilities, rather than cooperating with private operators, increased their competitive advantage to the extent of destroying the private sector. This factor alone distinguishes all of the authorities cited by petitioner.

As the Supreme Court of Pennsylvania held:

> ". . . it is unnecessary for private lot operators to prove that they cannot pass the tax onto their customers (although as previously noted the Commonwealth Court found this was not possible). See Samuels, supra; Eglin, supra. Clearly by raising their rates the private operators would greatly increase the already significant rate differential between private and public parking lots. The public competition thus effectively prohibits private lot operators from increasing their rates and passing the tax on to their patrons, while the imposed tax appropriates whatever earnings were formerly produced. Where such an unfair competitive advantage accrues, generated by the use of public funds, to a local government at the expense of private property owners, without just compensation, a clear constitutional violation has occurred." (A. 23a, 24a)

Petitioner urges this Court to accept review, urging that the decision of the Supreme Court of Pennsylvania runs contrary to prior holdings of this Court. The Supreme

---

[10] This accounts for the extraordinary financial record of the respondents' parking operations for the year 1970; nine of the fourteen parking enterprises show projected losses and, of the others, the one showing the largest profit would earn an amount equal to only 2.9% of its gross revenues (Pl. Ex. 1, R. 507a-616a) For a detailed analysis of respondents' financial plight see the chart cited in the record and reproduced in the Appendix herein. (A. 71a)

Court of Pennsylvania was expressly cognizant of the cases in this Court which have held that it is rare for courts to strike down tax legislation. The court below cited and relied upon the principles contained in those decisions which expressly authorize judicial intervention in extreme instances where the legislature was shown to have acted arbitrarily in imposing a prohibitive tax (A. 18a-20a). See *e.g. A. Magnano Co. v. Hamilton*, 292 U. S. 40, 47, 54 S. Ct. 599 (1934). After reviewing the authorities that suggest that an excessive tax "standing alone" is not sufficient for judicial intervention, the Pennsylvania Supreme Court further noted that:

> ". . . these same courts have acknowledged that in exceptional circumstances the taxing power of the Legislature may be abused, and, if so, it would violate both the Fifth and Fourteenth Amendments." (A. 19a)[11]

The Court thereupon held that the combination of factors shown on this record relating to the effect of the prohibitive tax *in combination with favored governmental competition* renders the action of the City of Pittsburgh in imposing such a high rate of taxation to be arbitrary, especially when viewed in the context of state policy in the Parking Authority Law (A. 21a, 22a).

None of the cases cited by petitioner contain the following three elements on which the Pennsylvania Supreme Court based its opinion: (1) a tax found by the highest court of the state as well as its intermediate appellate court to be so excessive and unreasonable as to confiscate virtually all profits of all of the private sector of the industry; (2) direct public competition in the same industry;

---

[11] Similarly, Mr. Justice Holmes, in *Alaska Fish Co. v. Smith*, 255 U. S. 44, 49, 41 S. Ct. 219 (1921), stated:

> "We need not consider whether abuses of the power might go to such a point as to transcend it, for we have not such a case before us."

and (3) leading to a result in the industry directly contrary to legislative intent and policy in authorizing public entry into the field.

Puget Sound Power and Light Co. v. Seattle, 219 U. S. 619, 54 S. Ct. 542 (1934), upon which petitioner relies, is totally inapposite to the facts of this case. The basic issue there was not whether the tax was arbitrary and confiscatory, but whether there was a denial of equal protection in taxing a private light and power utility, when there existed a government-owned public utility in the same business. The tax in *Puget Sound* was very small, 3%, as compared to 20% here, there was no claim that the tax was excessive or unreasonable and there was no evidence that any private company had suffered financial losses by reason of the tax, or that its continued existence was in jeopardy. Nor was the taxing statute in *Puget Sound* in conflict with state legislative policy, which had created a public utility regulated monopoly. Finally, in *Puget Sound*, the highest court of the state had sustained the municipal licensing tax, finding no constitutional infirmity. In this case, the Pennsylvania Supreme Court, interpreting state policy, invalidated the City of Pittsburgh's parking tax.

Contrary to the assertion of petitioner, *Jayne v. City of Detroit*, 348 U. S. 802 (1954) does not support its position. *Jayne* was not even decided on its merits by this Court but was dismissed for want of a substantial federal question. Moreover, the *Jayne* case, as well as *Gate City Garage v. City of Jacksonville*, 66 So. 2d 653 (Fla. 1953) and *Bowman v. Kansas City*, 361 Mo. 14, 233 S. W. 2d 26 (1950), do not even involve taxes, but raise only the question as to whether public competition is permitted in fields previously occupied by private enterprise.

Finally, *Veazie Bank v. Fenno*, 75 U. S. (8 Wall.) 492 (1869), is similarly inapposite. That case turned on a basic issue of federalism, whether the national government could tax and restrain state bank franchises under national currency powers without violating the reserved powers of the states. 75 U. S. at 547. This Court held that state-created banking institutions were not exempt from federal taxation and that Congress, through its currency and taxing powers, could restrict state circulation of bank notes in order to encourage national banks. No such issue of federalism is presented here. Rather, the highest state court of Pennsylvania has concluded that a municipality's tax was contrary to state legislative intention. *Veazie* also raised the issue of the separation of powers between co-equal federal branch in this Court's review of congressional taxing and currency powers. In the present case, the state court's review of a municipal tax ordinance in the context of state enabling legislation, does not raise any similar issue concerning separation of powers.

Neither the Supreme Court of Pennsylvania nor the respondent taxpayers have argued that the City of Pittsburgh may not compete in the parking industry, or even tax the parking industry while at the same time competing in it. In addition, respondents have not challenged the City of Pittsburgh's or the Pittsburgh Parking Authority's right to employ whatever inherent advantages they have at their disposal, such as the ability to charge lower rates due to exemption from real estate taxes, and low interest, long term financing. The basic evil challenged by respondents and struck down by the Court was a prohibitive 20% tax "off the top", which deprives respondents of any opportunity for profit in an industry where the taxing body, by its ability to compete advantageously, also precludes

the respondent taxpayers from any attempt to recapture their profits by raising their parking rates. This unique situation exists in the context of a specific Pennsylvania legislative enactment of policy that public and private parking industry should cooperate, not compete, in alleviating the parking crisis.[12]

The record in this case demonstrates that, with a 20% gross receipts tax, and direct privileged public competition, there is no conceivable way the majority of respondents, representing 95% of the private parking industry, can make any profit whatsoever. Under these circumstances, the court below correctly found respondents' property to have been, in effect, confiscated by the City government through its arbitrary tax (A. 26a).

Petitioner also asserts that the effect of the decision below will be to destroy the ability of the City government to provide services (P. 21). This argument is not only a *non sequitur*, but is baseless in view of the care with which the Pennsylvania Supreme Court restricted the scope of its decision to the particular facts and circumstances and state legislative intentions presented on this record, which enabled it to conclude that:

> ". . . the unreasonably burdensome 20 percent gross receipts tax, causing the majority of private parking lot operators to operate their businesses at a loss, *in the special competitive circumstances of this case*, constitutes an unconstitutional taking of private property without due process of law in violation of the Fourteenth Amendment of the United States Constitution." (A. 26a) (Emphasis supplied)

---

[12] Parking Authority Law, 1947, June 5, P. L. 458, § 2; 53 P. S. Ann. § 342.

III

The Record below overwhelmingly supports the finding of the Supreme Court of Pennsylvania that the 20% gross receipts parking tax is confiscatory.

The decision of the Supreme Court of Pennsylvania rests upon an overwhelming factual demonstration that the Pittsburgh 20% gross receipts tax is arbitrary, unreasonable and confiscatory. The devasting impact of the tax on the entire parking industry in the City of Pittsburgh is demonstrated by the financial statements contained in the Record below. In location after location, these statements establish the confiscatory effect of the 20% tax in conjunction with the direct favored competition of the Pittsburgh Parking Authority. The 1970 figures show the following results:

Operator	Number of Locations	Total Gross Parking Revenue 1970	Total Income (Loss)	Income as % of Revenue	Record Reference
Alco Parking Corp.	10	$1,446,446	(5,981)	—	R. 515a
William Penn Parking Lots	9	661,571	(3,703)	—	R. 533a
Parking Service Corp.	3	1,965,264	(118,887)	—	R. 549a
Arena Parking Inc.	2	404,048	729	0.2%	R. 557a
Fourth Avenue Parking Inc.	2	550,964	16,126	2.9%	R. 562a
William Penn Parking Garage Inc.	1	130,613	(5,384)	—	R. 567a
Campus Parking Inc.	1	146,136	(19,048)	—	R. 571a
Grant Parking Inc.	1	320,178	(62,429)	—	R. 575a
Oliver Plaza Garage	1	282,923	650	0.2%	R. 576a
Liberty Avenue Lots	1	175,403	536	0.3%	R. 577a
Stanwix Auto-Park	7	638,895	(13,604)	—	R. 581a
Meyers Parking System	1	1,015,188	17,377	1.7%	R. 685a
K-Seven Parking Co., includes St. Francis Hospital Lot	4	285,549	(34,175)	—	R. 609a
Total Industry	46	$8,169,558	(269,699)	—	

Detailed examination of the financial statements of individual respondents reinforces the conclusion that the 20% gross receipts tax is confiscatory. Meyers Brothers' Chatham Center Garage, for example, increased its gross parking revenues from $967,325 in 1969 to $1,015,188 in 1970—an increase of approximately $48,000. At the same time, by more efficient management, Meyers Brothers was able to reduce its operating expenses by about $12,000. Despite the increased gross revenue and decreased expenses in 1970, Meyers Brothers did worse than the year before—because the 20% tax increased by over $62,000 to a staggering burden of $198,977 (R. 606a). Because of this, Meyers Brothers' $1 million gross hardly produced any net profit at all. Meyers Brothers' profits dropped from 6.4% in 1968 under a 10% tax, to 3% in 1969 under a 15% tax to 1.7% in 1970 under the 20% tax (R. 606a).

This pattern is reflected throughout respondents' financial documents. A typical location, Sixth and Penn Garage indicates a 1970 gross of $370,455 with an operating loss of $23,902 at the 20% tax rate. Had the tax remained at 15%, the loss would have been $6,862. At a 10% rate there would have been a profit of $11,660, a return of 3.1% on the 1970 gross (R. 80a-81a).

The entire Stanwix Auto Parking operation with a gross of $638,895 in 1970 lost $13,604 at the 20% tax rate. At a 15% rate there would have been a profit of $15,631, a 2.4% return on the $638,895 gross (R. 81a). Total parking revenues for Alco Parking for 1970 were $1,446,446, leading to a $5,981 loss under the 20% tax. Had the tax remained at the 15% rate, there would have been a $56,755 profit, returning 3.9% of the gross (R. 82a).

Seymour Gline, the Vice President of Meyers Parking Systems in charge of 200 national locations, testified that it was not financially feasible for a major parking operator to realize a profit with the 20% parking tax in effect (R. 279a). Moreover, Mr. Gline testified that he was not aware of any major parking operation in the United States which makes a profit of 20% of gross receipts (R. 279a-280a). Major operator Harry Shepard, Jr., also testified that the 20% tax has also deprived Pittsburgh's parking operators of the ability to sell their businesses (R. 171a).

Throughout this litigation, the City of Pittsburgh has ignored respondents' evidence entirely and relied instead on the bald assertion, unsupported by any evidence, that the private parking industry was flourishing. In its trial memorandum, for example, the City of Pittsburgh stated:

> "[T]hat, except for a few borderline operations, *all parking lot operators in the City of Pittsburgh, including the plaintiffs, are realizing a comfortable profit on their investments.* The industry is not only not threatened with extinction by the prospect of an additional 5% tax levy [to 20%], but it is a healthy business considering this period of economic regression." Trial Memorandum, City of Pittsburgh, p. 3 (Emphasis added)

The City's position is completely negated by respondents' Exhibit 1 (Pl. Ex. 1, R. 507a-616a) and the City failed to offer any evidence in support of its contentions. Respondents, who are the major parking operators in Pittsburgh, are either losing money or showing no profit at all on their huge investments. As the court below found, contrary to state legislative policy, by its excessive 20% gross receipts tax and privileged public competition, Pittsburgh has in effect condemned respondents' property by rendering it impossible for them to make any economic return. As Justice Roberts emphasized:

"Not only is the Parking Authority able to charge lower rates than private operators, but with the enactment of the 20 percent gross receipts tax the taxing body now appropriates for itself practically all of the earnings of the private parking lot operators. By taking 20 percent of gross revenues 'off the top' the City effectively confiscates what were formerly the earnings of the parking lot owners. This confiscation is practically as complete as if the City had condemned without compensation the private lots to erect public facilities." (A. 23a)

Since few businesses in the United States return anything approaching 20% profits on gross receipts, it is hardly surprising that the 20% gross receipts tax has made it impossible for the parking industry in Pittsburgh to survive economically.

The entire trial record is also replete with uncontradicted evidence that the 20% tax could not be passed on to customers, as both the seven judge Commonwealth Court and the Supreme Court of Pennylvania found. For example, Peter Smith, Manager of the Meyers Brothers Chatham Center Garage, described the disastrous results of raising customers' parking rates on two prior occasions. In February 1969, the tax rate rose from 10 to 15%. In an attempt to pass on this increase, Meyers Brothers' rates were raised as follows:

24 hour rate from $1.75 to $2.00
8-12 hour rate from $1.25 to $1.50.

Even this relatively minor increase in rates caused a decline in the number of cars using the parking facility (R. 250a), and eventually necessitated cutbacks in the cashier's and attendants' staff (R. 251a-252a).

Again in Ooctober 1969, Meyers Brothers raised its rates to $2.25 for a 24 hour maximum and $1.75 for 8 to

12 hour parking. In this instance, business dropped off so sharply that four to five hundred parking spaces were left empty each day. Meyers Brothers was forced to lay off more personnel and to close off an entire floor of the garage (R. 252a-253a). Mr. Smith testified that when the tax rate was increased from 15 to 20%, another increase in parking rates would have resulted in Meyers having "no business whatsoever" (R. 254a). In fact, Meyers Brothers was compelled to institute a lower "early bird" rate in order to draw back some of its former customers (R. 254a).

Respondents' to pass on the tax was further demonstrated by the privileged competitive position of the Pittsburgh Public Parking Authority. Contrary to petitioner's assertion (Pp. 28-29), the record repeatedly substantiates the findings of the Supreme Court of Pennsylvania that the Parking Authority's rates are pegged far below those of the private operators. For example, the all-day (10-hour) rate for seven private operations—the Stanwix Garage, the four Grant-Smithfield lots, the Oliver Plaza Garage and the Oliver Plaza lot, among others—was $3.00 in 1970 (R. 618a, 578a), while the rate for the same interval at three competing Public Parking Authority garages at Bigelow Boulevard, Third Avenue and Ninth Street, was only $2.00 (R. 554a).

The most thorough compilation of Public Parking Authority and private rates is contained in the June, 1970 report by national parking experts Wilber Smith & Associates, who were retained to make the study by the Public Parking Authority of Pittsburgh itself (Pl. Ex. 11, R. 639a). The report is reprinted in full at pages 639 through 711 of the record. Table 3, reproduced at page 659 of the record, clearly demonstrates the disparities between the rate charged by the Public Parking Authority and private operators:

"TABLE 3

AVERAGE PARKING RATES

Interval	*Public Lots*[1]	*Public Garages*[2]	*Parking Authority Garages*[3]
1—Hour	$0.63	$0.70	$0.35
2—Hours	0.97	0.92	0.51
3—Hours	1.25	1.15	0.83
All-Day	1.97	2.11	1.73

(1) 30 public lots.
(2) Eight public garages.
(3) Eight Parking Authority garages."

The table establishes the fact that the short-term parking rates of the Parking Authority garages, which Donald M. McNeil, the leading parking expert in the City of Pittsburgh, testified is the critical factor for a "successful financial program" (R. 352a), are an average of one-half the private operators' rates, and that for any interval the Public Parking Authority substantially undercuts the dates of its private competitors.[13]

[13] Petitioner's contention (P. 31) that it introduced evidence that the tax could be passed on, based on the City's experience at its own wharf facility, is baseless. The City raised its all-day parking rate on its own small wharf lot from 75 cents to $1.50, after the City Treasurer concluded "this was too big of a bargain". (R. 427a) The City relies on the fact that there was little decrease in the number of customers using the City lot after the rate increase. This is hardly surprising, however, since the City's lot, even at its increased rate of $1.50 a day, was still a $1.00 cheaper than the rates charged in respondents' locations as well as those charged by its own Public Parking Authority. (R. 439a-440a) Accordingly, the City's raising its absurdly low parking rate to a level still far below the rate charged by any other parking facility in Pittsburgh is meaningless.

Donald McNeil testified, as an expert witness, that his studies have indicated that parking operators had reached a "point of no return" by raising their rates to a level where further rate increases would discourage shoppers from coming to downtown Pittsburgh at all. (R. 303a)

The uncontradicted record supports the conclusion of the Supreme Court of Pennsylvania that in the special competitive circumstances presented here, the City's prohibitive 20% gross receipts tax was arbitrary and unreasonable when combined with devastating public competition completely contrary to the intent of the State Legislature authorizing public entry into the parking industry. These factual findings are fully supported by the record and should not be reviewed by this Court.

Conclusion

For the foregoing reasons, it is respectfully requested that this Court deny the petition of the City of Pittsburgh for the issuance of a writ of certiorari to review the decree of the Supreme Court of Pennsylvania.

Respectfully submitted,

LEONARD BOREMAN,
RICHARD H. MARTIN,
BASKIN, BOREMAN, WILNER,
SACHS, GONDELMAN & CRAIG,

Attorneys for Respondents.

LEONARD M. MARKS,
GOLD, FARRELL & MARKS,
Special Counsel for Respondent,
Meyers Bros. Parking-Central
Corporation.